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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Interconnection and Resale Obligations Pertaining
to Commercial Mobile Radio Services

CC Docket No. 94-54

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**REPLY OF SPRINT SPECTRUM L.P., d/b/a SPRINT PCS, IN SUPPORT OF
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint PCS"), pursuant to the Federal Register notice dated September 12, 1996,¹ hereby submits its Reply in support of the petitions for reconsideration and/or clarification (the "Petitions") of the Federal Communications Commission's ("FCC" or "Commission") *First Report and Order* in the above captioned proceeding,² filed on August 23, 1996 by AT&T Corporation ("AT&T") and the Personal Communications Industry Association ("PCIA").

I. INTRODUCTION

As AT&T and PCIA point out, the commercial mobile radio service ("CMRS") resale rule adopted in the *First Report and Order* serves no competitive purpose and imposes needless costs on CMRS providers and their customers.³ Accordingly, Sprint PCS agrees with those petitioners that the Commission should reconsider its *First Report and Order* and remove the mandatory resale requirement imposed on CMRS carriers. In the

¹ 61 Fed. Reg. 48154 (Sept. 12, 1996).

² *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order*, CC Docket No. 94-54, FCC 96-263 (July 12, 1996) ("*First Report and Order*").

³ PCIA Petition at 4-11; AT&T Petition at 1-4.

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alternative, if the resale requirement is retained, Sprint PCS urges that CMRS providers not be required to offer for resale any services that package customer premises equipment ("CPE") with CMRS service, so long as the service component of the bundled offering is made available to resellers.⁴

II. The CMRS Resale Rule Serves No Competitive Purpose and Should be Removed.

The Commission consistently has found that common carrier regulation -- including mandatory resale -- should be imposed only on service providers with the power to control price and output in the relevant market.⁵ In accordance with this principle, the Commission has imposed resale requirements only in highly concentrated markets where resale entry was needed to exert pricing discipline on incumbents.⁶ In wireless markets, in particular, resale

⁴ The views expressed in this Reply represent a departure from Sprint PCS's earlier support for a limited resale obligation for facilities-based CMRS providers. Comments of Sprint Telecommunications Venture in CC Docket No. 94-54, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 10 FCC Rcd 10666, 10671 (1995). Subsequent experience with the CMRS marketplace has convinced Sprint PCS that ample competition will develop without mandatory resale requirements of any kind, and that such requirements are therefore contrary to the public interest.

⁵ See, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, 6 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, *Final Decision*, 77 FCC 2d 384, 388 ("Computer II Order"), *modified on recon.*, 84 FCC 2d (1980), *further modified*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer Communications Industry Ass'n v. Fed. Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second recon.*, 56 Rad. Reg. 2 (P&F) 301 (May 4, 1984).

⁶ See *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 263 (1976) ("1996 Resale Order") *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. Federal Communications Commission*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1988); *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167 (1980); *Cellular Communications Systems*, 86 FCC 2d 469 (1982), *appeal dismissed sub nom. United States v. Federal Communications Commission*, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

requirements were first imposed at a time when cellular service was, at best, a duopoly and when many cellular markets (because licenses were awarded to wireline affiliates before they were awarded to nonwireline carriers) were effectively monopolized.

The market faced by PCS providers today bears no resemblance to the cellular industry. In each market in which a PCS carrier initiates service, it starts with zero market share and faces competition from entrenched cellular service providers, as well as the prospect of competition from other PCS and SMR licensees. Under these circumstances, it is an understatement to say, as the Commission does in the *First Report and Order*, that “the market power of broadband PCS providers is not parallel with that of cellular carriers.” In fact, there is no sense in which broadband PCS licensees can be said to have market power at all.

In spite of these facts, the *First Report and Order* concludes that mandatory resale is needed to prevent PCS providers from engaging in “price discrimination,”⁷ to encourage “competitive pricing,”⁸ and to adjust for the perceived headstart that present PCS licensees will enjoy over subsequent licensees.⁹ In the absence of market power, however, mandatory resale is not needed to achieve any of these results. There is no prospect that the present PCS licensees can engage in successful price discrimination or that they can compete with the established carriers without offering competitive prices. Nor does the present licensees’

⁷ *First Report and Order* at ¶18.

⁸ *Id.*

⁹ *Id.*

“headstart” call for a regulatory remedy. Incumbents in all markets have, by definition, a headstart over those who come later; but only where incumbents have market power does their headstart confer more than a temporary advantage over efficient competitors so as to justify regulatory intervention in the market.¹⁰

As the *First Report and Order* recognizes, regulation that is not required as a corrective to market power is likely to be inefficient and anticompetitive.¹¹ On this principle, which Sprint PCS fully endorses, the mandatory resale requirement for CMRS service should be withdrawn.

III. CMRS Providers Should Not Be required to Resell Offerings that Combine Service with Customer Premises Equipment.

Even if the Commission elects to retain the CMRS resale requirement, it should decline to extend that requirement to resale of CPE that is offered together with wireless telephone service. Such a requirement exceeds the FCC’s jurisdiction, undermines the policy served by deregulation of CPE and will make the CMRS market less efficient and competitive. Accordingly, Sprint PCS supports the requests of AT&T and PCIA that the Commission reconsider its rejection of AT&T’s suggestion that resale of bundled CMRS service and CPE not be required.¹²

¹⁰ In fact, the present PCS licensees are moving rapidly to deploy their networks in spite of their inability, because of technical incompatibility, to resell the services of the existing cellular carriers. Since resale was not needed to overcome the headstart of the cellular carriers (who arguably *have* market power), there is no reason to assume that it will be needed to overcome the headstart of the first-generation PCS licensees (who do not have market power).

¹¹ *Id.* at ¶14.

¹² See *AT&T Comments* at 26 n.56.; *First Report and Order* at ¶31 (“Although we do not preclude the possibility that a restriction on resale of a bundled package could be shown just and reasonable under some circumstances, we do not as a general matter limit application of the resale rule as AT&T requests.”)

A. The Commission Lacks Jurisdiction to Require Sale of CPE to Resellers.

Most fundamentally, carriers may only be ordered to resell services that are subject to Title II of the Communications Act.¹³ While Title II gives the Commission jurisdiction to require resale of CMRS providers' wireless telephone service, it provides no basis for mandatory resale of CPE, which the Commission removed from Title II regulation in 1980.¹⁴ In fact, customer equipment is no more subject to a resale requirement than any other non-Title II product or service -- such as airline mileage, hotel discounts or microwave ovens -- that might be offered to customers as an incentive to purchase CMRS service. The Commission should make it clear that CMRS providers are not required to make the CPE component of a bundled service available to resellers.

B. Mandatory Resale of CPE is an Abandonment of the Policies that Prompted the Commission to Deregulate CPE.

Aside from the jurisdictional impediment to mandatory resale of CPE, such a requirement will undermine the goal the Commission hoped to achieve when it removed CPE from Title II regulation. This Commission deregulated CPE precisely because that action would give consumers "more options in obtaining equipment that best suits their . . . needs," including "competitive pricing and payment options" that would be unavailable if equipment providers were subject to Title II requirements.¹⁵ Services that combine discounted CPE with wireless service offer precisely this kind of flexibility and consumer choice: they are among the principal means by which CMRS providers differentiate themselves from competitors, compete on price, and make wireless telephone service available to a broader public. If CMRS providers must offer these packages to resellers on

¹³ 1976 Resale Order at 263.

¹⁴ *Computer II Order* at 388.

¹⁵ *Computer II Order, supra*, 77 F.C.C. 2d at 439.

the same terms and conditions that they offer them to end users, a publicly beneficial form of competition will be foreclosed, the flexibility and consumer choice that deregulation of CPE was intended to achieve will be diminished, and facilities-based CMRS providers will be placed at an unfair disadvantage vis-a-vis resellers.¹⁶ These results are anticompetitive and contrary to the public interest and the FCC should clarify that the *First Report and Order* does not require them.

C. Mandatory Resale of CPE Is Not Needed to Promote Competition.

The Commission found in its *Bundling Order*¹⁷ that sale of CPE in conjunction with cellular service presents no anticompetitive threat sufficient to outweigh the benefits of such offerings.¹⁸ As the CMRS market grows rapidly more crowded with facilities-based competitors, the Commission's conclusion will be reinforced. Both CPE and CMRS services are subject to robust competition and provide no opportunity for tying, cross-subsidization or other predatory conduct.

In fact, all CMRS providers, whether incumbents or future entrants, are equally capable of purchasing wireless telephone handsets from handset manufacturers and offering

¹⁶ CMRS operators that purchase handsets in bulk and resell them at incentive prices to large-volume customers, perhaps in exchange for the customers' commitment to achieve a defined number of minutes of use, should not be forced to offer those handsets at those same prices to resellers who have far lower operating costs than the facilities-based carriers. Such a requirement would force facilities-based carriers to subsidize their competitors or, in the alternative, to withdraw a publicly beneficial marketing approach. See PCIA Comments at 15 and n. 34.

¹⁷ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4030, and 4031 (1992) ("*Bundling Order*").

¹⁸ The Commission also announced, in a footnote to the *Bundling Order*, that "restrictions on resellers' ability to buy packages of CPE and services on the same basis as other customers would be unlawful." *Id.* at 4035 n. 48. Sprint PCS agrees with PCIA that this conclusion, which was reached in the context of the duopoly cellular market, cannot be reconciled with the Commission's earlier deregulation of CPE. PCIA Petition at 14. Accordingly, the Commission either should withdraw the *Bundling Order* footnote, or should at least decline to extend its effect to bundled CPE/service packages offered by broadband PCS and covered SMR providers.

them to customers in a package with transmission services. Neither Sprint PCS, nor any other carrier, controls the telephone handset market or can affect the price and availability of CPE in any way. Under these circumstances, the offering of bundled service by CMRS providers presents no competitive threat that mandatory resale is needed to resolve.

II. CONCLUSION

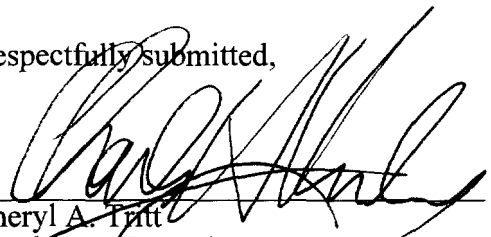
The Commission should grant the petitions of AT&T and PCIA and rule that CMRS providers are not subject to mandatory sale of their services to resellers. In the alternative, the Commission should find that facilities-based CMRS service providers are not obligated to offer CPE/service bundled packages to resellers on the same terms and conditions offered to other customers.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **REPLY OF SPRINT SPECTRUM L.P. d/b/a SPRINT PCS IN SUPPORT OF PETITIONS FOR RECONSIDERATION AND CLARIFICATION** was mailed on this 7th day of October, via first class U.S. mail to the following:

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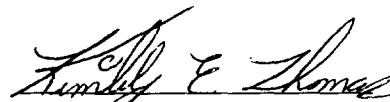
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